

D.P.U. 92-167

Petition of BioDevelopment Corporation to the Department of Public Utilities, pursuant to 220 C.M.R. § 8.07(2), regarding the review of project scoring and designation by Boston Edison Company of the Award Group for RFP 3.

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I. INTRODUCTION

A. Procedural History

On January 31, 1992, Bio Development Corporation ("Bio Development") submitted a proposal for its L'Energia III project in Boston Edison Company's ("BECO's") third request for proposals ("RFP 3") from non-utility generators ("NUGs").¹ On July 3, 1992, Bio Development filed a petition ("Petition") with the Department of Public Utilities ("Department"), pursuant to 220 C.M.R. § 8.07(2), accompanied by a supporting memorandum ("Bio Memorandum") and by an affidavit of Nicholas Stavropoulos ("Stavropoulos Affidavit"), vice president - finance of Colonial Gas Company ("Colonial"). The Petition asks the Department to (1) conduct a hearing on the Petition, (2) recalculate or require BECO to recalculate the score that BECO gave to L'Energia III in RFP 3, and (3) redesignate the RFP 3 award group to reflect the results of the requested rescoring of L'Energia III (Petition at 5-6). The Petition alleges that BECO inappropriately scored Bio Development's project proposal, reducing the total points that Bio Development had given the L'Energia III project in its self-score. Bio Development asserts that BECO's actions (1) violated BECO's obligations under the Department's regulations, at 220 C.M.R. §§ 8.00 et seq., (2) violated BECO's obligations under RFP 3, and (3) were "arbitrary, capricious, unreasonable, and without basis in fact" (id. at 5).

On July 9, 1992, the Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention pursuant to G.L. c. 12, § 11E. On July 10, 1992, the

¹ The proposed L'Energia III project is a 143 megawatt ("MW") gas-fired combined cycle cogeneration unit.

Department issued an Order of Notice that (1) set July 15, 1992 as the deadline to file a petition for leave to intervene in this docket, (2) established requirements for filing an answer or response to the Petition, and (3) set July 31, 1992 as the date to file any such answer or response. On July 10, 1992, Altresco Financial, Inc. ("Altresco") filed a petition for leave to intervene in this docket.² On July 15, 1992, CMS Generation Co. and Montvale Energy Associates, L.P. (jointly, "CMS") filed a joint petition for leave to intervene.³ On July 17, 1992, BioDevelopment filed a motion opposing the petitions to intervene of Altresco and CMS. On July 22, 1992, CMS replied to BioDevelopment's opposition, reiterating why it should be allowed to intervene. On July 23, 1992, the Hearing Officer issued a ruling (1) denying the petition to intervene of CMS, (2) denying the petition to intervene of Altresco, and (3) granting Altresco limited party status to address the legal issues raised in this docket.⁴ CMS was not granted limited party status.

On July 30, 1992, the Hearing Officer issued a notice that BioDevelopment could

² Altresco submitted a proposal in response to RFP 3 to sell power from a 132 MW natural gas-fired combined cycle unit in Lynn, Massachusetts.

³ CMS also submitted a proposal in RFP 3.

⁴ On July 28, 1992, Altresco appealed to the full Commission on the Hearing Officer's July 23, 1992 ruling denying Altresco's petition to intervene. On July 31, 1992, Altresco filed a motion for summary judgment. On August 3, 1992, BioDevelopment filed its opposition to Altresco's appeal, to which Altresco responded on August 5, 1992. On August 6, 1992, BioDevelopment filed a motion to strike Altresco's motion for summary judgment. Because of the Department's disposition of this case, the Department need not rule on Altresco's appeal of the Hearing Officer ruling or the motion for summary judgment. We make no further findings regarding Altresco's status as a party or limited party in this proceeding. Moreover, in light of our decision to reject the subject Petition, we expressly do not reach the issue of whether limited parties may file motions for summary judgment.

respond to BECo's anticipated answer to the Petition no later than August 6, 1992. On July 31, 1992, BECo filed an answer to the Petition ("BECo Answer"), supported by a memorandum ("BECo Memorandum"), and affidavits by William P. Kilgoar, Robert A. Howard, and John J. Reed. On July 31, 1992, Altresco filed an answer in support of BECo's rescoring of BioDevelopment's proposal ("Altresco Answer"), accompanied by a motion for summary judgment. On August 6, 1992, BioDevelopment filed a response to the BECo Answer ("Bio Response") and a response to the Altresco Answer.

B. Background on BECo's RFP 3

Pursuant to approval by the Department, BECo issued its RFP 3 on October 11, 1991.⁵ By January 31, 1992, the response deadline for proposals in RFP 3, BECo received 41 project proposals for a total of 3,300 MW.

On May 20, 1992, BECo petitioned the Department to defer further activities in RFP 3 to its first integrated resource management ("IRM") proceeding,⁶ and in particular to defer announcing the award group and negotiating purchased power contracts with award group members. On June 1, 1992, BECo announced that it had selected the Altresco Lynn project proposal as the sole member of the RFP 3 award group. On June 2, 1992, the

⁵ As issued, BECo's RFP 3 provided for a tentative supply block within the range of 132 MW to 306 MW. Boston Edison Company, D.P.U. 90-270, at 35 (1991). The Department later set the size of the final supply block at 132 MW. Boston Edison Company, D.P.U. 90-270-C at 4 (1992).

⁶ On July 24, 1992, the Attorney General filed a letter in this docket that recommended that BECo's "RFP 3 bidders submit new bids relying on (after Commission review) updated BECo avoided costs." The issue regarding the filing of new bids with updated cost information was resolved by the Department's recent decision in Boston Edison Company, D.P.U. 92-130 (1993), by requiring BECo to negotiate with the award group based on the existing project proposals.

Department ordered BECo to announce the award group but granted a temporary stay of BECo's obligation to negotiate and execute a purchase power contract with the RFP 3 award group. Boston Edison Company, D.P.U. 90-130-1, at 11, 13 (1992). During the following month, Bio Development and three other project sponsors⁷ submitted petitions to the Department, generally claiming that their bids were improperly scored, thereby challenging BECo's designation of Al tresco as the sole award group member. In addition, two other project sponsors⁸ filed petitions with the Department because of BECo's decision to disqualify their bids.

On June 25, 1993, the Department issued an Order denying BECo's May 20, 1992 petition to defer further activities in RFP 3. Boston Edison Company, D.P.U. 92-130 (1993). The Department required BECo to begin negotiating a purchase power contract with the RFP 3 award group but suspended BECo's obligation to execute a contract with the RFP 3 award group until the Department issues final orders in the proceedings involving challenges to the rankings in BECo's RFP 3. Id. at 33-34.

On June 30, 1993, BECo filed with the Department a motion for immediate stay of the Department's June 25, 1993 Order in D.P.U. 92-130. In an Order dated July 14, 1993 the Department denied this motion. Boston Edison Company, D.P.U. 92-130-A (1993).

⁷ The three other proceedings regarding allegations of improper scoring are CMS Generating Company and Montvale Energy Associates, L.P., D.P.U. 92-166; Concord Energy Corporation, D.P.U. 92-144; and Williams/Newcorp Generating Company, D.P.U. 92-146.

⁸ The two proceedings regarding disqualified bidders are DLS Energy, Inc., D.P.U. 92-153, and West Lynn Cogeneration, D.P.U. 92-142. West Lynn Cogeneration has since withdrawn its petition.

Also on July 14, 1993, BECo filed an appeal of the Department's June 25, 1993 Order with the Massachusetts Supreme Judicial Court.

II. STANDARD OF REVIEW

The Department's regulations governing the purchase of power from NUGs state that if, "at any time, a qualifying facility is aggrieved by an action of a utility pursuant to these regulations, the qualifying facility may petition the Department to investigate such action." 220 C.M.R. § 8.07(2). In reviewing any petition filed pursuant to 220 C.M.R. § 8.07(2), the Department applies a standard of "reasonableness." In Riverside Steam and Electric Company, D.P.U. 88-123, at 19-20 (1988), the Department stated

In reviewing the utility's actions, the Department will not substitute its own judgment for that of the utility so long as there is a reasonable basis for the utility's actions. Thus the Department will impose appropriate remedies only if it finds that, given what the utility knew or should have known at the time, its actions had no reasonable basis. Under 220 C.M.R. § 8.07(2), the burden of proof is on the aggrieved OF [qualifying facility].

Id. at 20; see also Destec Energy et al., D.P.U. 92-46, at 4-5 (1992) ("Destec"); EUA Power Corporation, D.P.U. 92-38, at 5 (1992); Riverside Steam and Electric Company, D.P.U. 88-123-B at 7, 50 (1991); and Boston Edison Company, D.P.U. 88-158, at 23 (1990).

Furthermore, the Department has recognized that in the management of its request for proposals ("RFP") process, an electric company is allowed a measure of discretion:

[I]n matters concerning an approved RFP, the Department will allow an electric company a measure of discretion in administering and managing the RFP process. Allowing a measure of discretion at this stage in the RFP process is appropriate in light of the Department's regulations [220 C.M.R. §§ 8.00 et seq.] governing other stages of the RFP process where explicit requirements for the content of an RFP and the solicitation and contracting

processes are evident.

Destec at 13. In Destec, the Department reaffirmed its position that electric utility companies may use discretion in implementing the instructions and requirements of an RFP, but also indicated that an electric company must administer its RFP in a manner that prevents favoritism and treats all project sponsors equitably. Id. at 13-14.

Additionally, the Department must endeavor to ensure that an electric company's scoring system is applied in a manner that maximizes net benefits to ratepayers. See 220 C.M.R. § 8.05(5)(c). Therefore, in assessing the reasonableness of BECo's application of its scoring system, the Department will consider whether a scoring decision appropriately recognizes the actual benefits that a proposed project offers ratepayers.

III. RESCORING ISSUE

A. Introduction

BECo reduced the L'Energia II Fuel Supply score from the ten points claimed by Bio Development to its self-score of three points. Bio Development claims that BECo stated that it did so because a "review of the project's gas and transportation agreements indicated that the transportation on Colonial's transmission system is not firm" (Petition at 4).

B. Fuel Supply Scoring

1. Positions of the Parties

a. Bio Development

Bio Development contends that BECo erred because it maintains that gas transportation on the Colonial system is indeed firm, and that the Fuel Supply score was therefore improperly reduced to only three points (Bio Memorandum at 6-7).

With this project proposal, Bio Development submitted a January 24, 1992 letter from Mr. Stavropoulos, containing a preliminary analysis of the cost of the incremental gas distribution facilities that would have to be added to the Colonial system to serve L'Energia II (Petition, Exh. A, Vol. 3, Tab 7, Part 2). To support its contentions, Bio Development also presented the Stavropoulos Affidavit with this Petition (Petition, Exh. F). Referring to the Stavropoulos Affidavit, Bio Development contends that the terms of the arrangements between Colonial and Bio Development call for 365 days per year of firm gas transportation on the Colonial system to Bio Development's L'Energia II facility (Bio Development Memorandum at 6). According to Bio Development, this documented arrangement entitles L'Energia II to ten points in the Fuel Supply category (i.d. at 7).

Bio Development objects to the BECo Answer on three grounds. First, Bio Development contends that nothing in RFP 3 requires or suggests the need for an executed contract to support its Fuel Supply score (Bio Response at 8). Second, Bio Development contends that "firm" gas transportation, as used in Evaluation Sheet 11 of RFP 3, does not mean that legally binding documents must exist to guarantee gas transportation, but rather that the arranged gas transportation must not be interruptible (i.d.). Bio Development maintains that BECo's position, that part of L'Energia II's gas transportation is interruptible, ignores the language of Bio Development's contract with District Gas of Massachusetts ("District Gas"), which also was submitted to BECo with the L'Energia II proposal (i.d. at 11-12). Bio Development maintains that the contract requires District Gas to provide firm delivery of L'Energia II's gas supplies to the Colonial system (i.d.).

Third, Bio Development contends that BECo's treatment of this issue is tantamount to

creating a new basis for scoring projects in the Fuel Supply category (i.d. at 2, 11-13). Bio Development further contends that if BECo had identified its concerns to Bio Development in April 1992, Bio Development would have been able to satisfy BECo's concerns (i.d. at 12).

Bio Development also argues that allowing three points in the Fuel Supply category would be justified only if the L'Energia II proposal evidenced gas supply and gas transportation for fewer than 270 days per year (Bio Memorandum at 7). Bio Development contends that, given the information submitted with its proposal, the basis for BECo's score of only three points "is a complete mystery" (i.d.).

b. BECo

BECo claims that no reasonable reading of the L'Energia II proposal or its supporting documentation supported Bio Development's claim that it had made firm gas transportation arrangements for the entire period across which L'Energia II would be expected to provide power to BECo (BECo Memorandum at 10). BECo claims that (1) contrary to Bio Development's claims, the Bio Development proposal contains no documentation of firm gas transportation on the Colonial system, (2) the anticipated gas transportation from Distri gas to Colonial is under an interruptible tariff (I I-1) on the Tennessee Gas Pipeline ("Tennessee"), (3) the transportation contract between L'Energia II and Distri gas has an extremely broad "Force Majeure" clause that indicates that gas transportation could be interrupted without limit, and (4) Distri gas' agreement with Boston Gas Company (through whose system gas from Distri gas must pass) is for only ten years, less than the 20-year term across which L'Energia II might supply BECo (i.d. at 12-15).

BECo emphasizes that documentation sufficient to show that L'Energia II had firm

transportation arrangements on the Colonial system simply was not provided with Bio Development's bid (i.d. at 17). BECo contrasts Colonial's "williness and ability" to provide firm transportation, as set forth in the Stavropoulos Affidavit, with Bio Development's claim that it had made arrangements for firm gas transportation for 365 days per year (i.d.). BECo argues that L'Energia II might be entitled to a Fuel Supply score of only one point, but it assumed that L'Energia II could at least gain access to interruptible transportation, and thus raised the score for Bio Development's proposal to three points (i.d. at 14).

c. Altresco

Altresco argues that the Stavropoulos Affidavit does not provide a basis for the score that Bio Development claims. Altresco notes that (1) no documentation of arrangements between Bio Development and Colonial Gas was provided in Bio Development's proposal, (2) the Stavropoulos Affidavit does not state that a firm 365-day contract between L'Energia II and Colonial had been executed, and (3) the Stavropoulos Affidavit "is laden with carefully chosen words such as 'committed', 'williness', and 'ability' in describing the status of fuel-transportation arrangements between L'Energia II and Colonial" (Altresco Answer at 5).

2. Analysis and Findings

As approved by the Department on October 9, 1991, Section 4.3.6.(b) of BECo's RFP 3 states:

The support documentation provided... must, in all cases, contain information in sufficient detail to allow BECo to unequivocally confirm the representations made by Sponsor in its Project Proposal. It is the Sponsor's sole responsibility

to provide documentation meeting the standards described above, and BECo is under no obligation to request additional documentation if the submitted documentation is insufficient in BECo's judgment.

Additionally, the RFP states that BECo must score bids based on information submitted with the project proposal (BECo RFP, § 4.3.4).

The Department will examine actions of BECo in scoring Bio Development's proposal based on what BECo knew or reasonably should have known at the time of its scoring of the RFP 3 proposals. The January 24, 1992 letter from Mr. Stavropoulos to Bio Development about preliminary cost estimates for connecting L'Energia II to the Colonial system was not sufficient by itself to allow BECo to "unequivocally confirm" that L'Energia II has a claim to firm transportation on the Colonial system.⁹

More important, the contract between Distigas and L'Energia II, filed as supporting documentation for the Bio Development proposal, references use of the Tennessee pipeline under Tennessee's T-1 interruptible tariff. Documentation demonstrating the availability of interruptible gas transportation service would not allow BECo to unequivocally confirm that firm gas transportation would be provided for all the stages from wellhead to L'Energia II.

Based on the information presented in this proceeding, BECo's judgment that the documentation supplied with the project proposal did not adequately support Bio Development's claim was reasonable. Therefore, the Department finds that Bio Development

⁹ The Stavropoulos Affidavit was not submitted with Bio Development's project proposal, nor by the deadline for submitting proposals and supporting documentation in RFP 3. Therefore, any new information contained in the Stavropoulos Affidavit cannot be considered by BECo in scoring the L'Energia II bid. Moreover, even if BECo had considered it, the Stavropoulos Affidavit still falls short of constituting an unequivocal confirmation (such as a contract) that L'Energia II has firm gas transportation.

has not shown that BECo's reduction to L'Energia II's claimed Fuel Supply score was unreasonable.¹⁰

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the petition of Bio Development Corporation filed with the Department on July 3, 1992 be and hereby is DENIED.

By Order of the Department,

¹⁰ RFP 3 provides that projects with letters of intent for gas supply and gas transportation are entitled to only one point in the Fuel Supply category (RFP 3, Evaluation Sheet 11, at 2). However, given L'Energia II's fuel supply arrangements, as well as prospects for firm gas transportation for much of the contract term, BECo's decision to award more than one point, but no more than three points, to L'Energia II for Fuel Supply has not been shown to be unreasonable.